IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6616 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHIVLAL MANILAL PATEL

Versus

JAMNAGAR MUNICIPAL CORPORATION

Appearance:

MR MANOJ N POPAT for Petitioner

MR JR NANAVATI for Respondent

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 17/11/2000

ORAL JUDGEMENT

Could the order of the respondent Jamnagar Municipal Corporation (Corporation) compulsorily retiring the petitioner from service at the age of 55 with effect from 30.11.87, from the post of Steno-typist recorded by the then Commissioner, be said to be illegal, without

authority, unconstitutional or in any way vulnerable ? This is the sole question which has been posed in this petition under Article 226 of the Constitution of India.

The skeleton projection of facts leading to the rise of this petition may be highlighted, at first.

The petitioner was employed and was working as English Typist with the respondent Corporation. He was promoted as Steno/PA in course of his service and retired from service, compulsorily, by the Corporation at the age of 55. The petitioner remained in service of the Corporation for period of 36 years. The petitioner had relied on some certificates of his having done good work in service in support of his plea that the order of compulsory retirement recorded against him is illegal. Briefly stated, his claim is that without any rhyme or reason, he has been visited with the order of compulsory retirement by the Corporation at the age of 55, otherwise he would have been able to enjoy the employment till the age of 58 if not 60.

The respondent Corporation has denied the claim and the averments made in the petition by filing counter by the Assistant Commissioner of the Corporation. The petitioner has also filed counter-affidavit and has stated that he is entitled to continue in the service upto 60 years according to the settlement between the staff Union and the respondent Corporation and that he has not applied for voluntary retirement.

Compulsory retirement is an important aspect and scheme of service jurisprudence. There is a purpose and policy behind it. There is a long interesting history in incorporating the right of the employer or a master for exercising compulsory retirement after certain period of service or after certain age. Compulsory retirement is, essentially, of two categories.

(1) Compulsory retirement by way of punishment,

(2) Compulsory retirement in exercise of rule or statutory power enjoyed by the employer;

Compulsory and premature retirement from the service, undoubtedly, constitutes an integral part of service life, mechanism and service jurisprudence. There are various important contours and chronicles of this branch. The right to hold the civil post or right of the Government servant has legal protection. The right

continues until the age of retirement fixed by the Government, authority or employer in exercise of power regulating the conditions of service. No doubt, a public servant or holder of the civil post may, also, retire from service, voluntarily. Same way, master or the employer or the State, as the case may be, can compulsorily retire the servant, where empowerment to the master is available or by the Government by virtue of service rules made under proviso to Article 309 of the Constitution of India. Holders of service, also, may choose for voluntary retirement, after completion of certain specified period which is known as premature retirement. It may, also, be mentioned that right to continue in service can be determined by the competent authority, as a measure of penalty, after undergoing requisite process and procedure. It would be, therefore, appropriate, at this stage, to place on record certain important principles relating to compulsory or premature retirement.

1. The design and desideratum of premature or compulsory retirement is to weed out inefficient, corrupt, tainted, dishonest and dead-wood employees from the service.

2. Compulsory retirement simpliciter in accordance with the terms and conditions of service or under the statute or rule, obviously, does not amount to dismissal or removal or reduction in rank because the Government servant or the employee does not lose the terminal benefits till then earned. In case of Government servant, the provisions of Article 311(2) of the Constitution of India would not be attracted if there is no element of penalty in the order. No doubt, if the Government servants terms and conditions of service under the contract of service has a right to continue in a post and his service is determined by an order of compulsory retirement, or on the basis of charge of misconduct or dereliction of his duty or inefficiency or incapacity, it would be a case of punishment of removal or dismissal and subject to judicial scrutiny. However, if the Government servant or the holder of the civil post, substantively, or a permanent post is compulsorily retired under the service rules, it will not attract the provisions of Article 311(2) or any statutory inhibition. The power of compulsory retirement is to be exercised in the administrative interest or in public interest.

3. When the interest of public administration requires retirement of the holder of the civil post, who, with the passage of years ceased to possess the standard of efficiency, competence, usefulness, resourcefulness, initiative or utility, he can be compulsorily retired. If a person is found physically or mentally unfit to continue in service, such person can also be compulsorily retired. No doubt, order of compulsorily retirement has to be recorded objectively upon the material and on the subjective satisfaction of the Government of finding that it is in public interest or in the interest of the administration.

4. Nonetheless, when a decision to retire is based upon the relevant material and service record, mere fact that expression "public interest" or "administrative convenience and interest" are not incorporated explicitly in the order itself, does not render the order invalid. It is true that there must be relevant material and sufficient subjective satisfaction in support of passing of such an order.

5. If it is, successfully, shown that it is tainted or coloured or is totally biased or is out of certain animosity or with malice, an aggrieved civil servant can challenge the order of compulsory retirement and it has to stand the judicial scrutiny.

6. Compulsory retirement can only be recorded and passed by the competent authority, otherwise it becomes vulnerable.

7. It may be stated that when under the rules, appointing authority is the competent authority to pass order of compulsory retirement in relation to a civil servant and appointing authority is changed, the authority who is the appointing authority under the rules, in force, alone has the power to exercise the power of compulsory retirement.

8. If it is, successfully, shown, upon a challenge under judicial review by an aggrieved civil servant that the order of compulsory retirement is an outcome of lack of requisite opinion required to be formed before passing it, that

> such a decision is founded upon extraneous or collateral purpose, that it emanates out of malice or bias, that it is tainted with arbitrariness or is capricious without supporting justification, or that it is passed by a person not competent to make it, such an order will not stand the judicial scrutiny.

Government servants get Constitutional protection under Articles 14, 16 and 311 of the Constitution. The Constitutional framers and Founding Father of the Constitution have devised and designed the doctrine of equal opportunity of employment and protection to the civil servants or holder of the civil post for many reasons. One of the main reasons is that the holder of the said post can perform and function freely and fearlessly. At the same time, the constitutional protections are subject to the terms and conditions of the service and the rules made under Article 309 of the Constitution. As stated above, under the legal sanction or under the terms and conditions of the contract of service or by rule provision which are not inconsistent or incompatible with the constitutional provisions, the master or the State or the employer can retire the service of the servant, prematurely, upon being satisfied that continuance of such a person is not in the interest of administration or public interest. Such an important right of the master has to be exercised carefully and objectively. At the same time, the civil servants should also realise that the constitutional and statutory protections afforded to them should be used to advance the interest of the administration and also in the public interest and it can never be allowed to abuse or misuse.

Needless to mention, the higher the ladder of the officers in the echelon in service, the greater should be the transparency, integrity, honesty, industry, dedication, devotion, cohesion, character and comity of service and proper discharge of function and careful observation of the duty. The work culture and self-imposed discipline would enhance not only the experience of service but the majesty of service and will send right signal to others.

It may, also, be noted that high ranking officers or members of the judiciary who exercise the sovereign judicial powers of the State are required to be assessed with higher and better standard. Hence such officers must be fit in all respect for discharge of such onerous duties. It is, rightly, said that the conduct of every judicial officer should be above reproach. He should be

conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

The Hon'ble Apex Court has, also, emphasised, that the benefit of increase of retirement age shall not be available, automatically, to all judicial officers irrespective of past record of service and evidence of their continued utility to the judicial system. Therefore, it has been directed that the benefit will available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officers' past record of service, character rolls, quality of judgments and other relevant matters.

In so far as compulsory retirement is concerned, certain more and useful celebrated principles of service jurisprudence may be highlighted:

(1) Any adverse entry prior to earning of promotion of crossing of efficiency bar or picking up higher rank is not erased and could be taken into consideration while examining the overall performance of the employee during the whole of his tenure of service, whether it is in public interest to retain him in the service. Thus the whole record of service of the employee will include any uncommunicated adverse entries as well.

(2) The fundamental doctrine "Nemo firut repente turpissimus" which means no one becomes dishonest all of a sudden also must be borne in mind. No doubt, this maxim is not unexceptional, but still it is a salutary guideline to Judge human conduct particularly in the realm of administrative law.

(3) Compulsory retirement is subject to judicial review. Order can be assailed if it is arbitrary, biased or malafide or based on no evidence.

(4) In case of clean compulsory retirement, principles of natural justice are inapplicable.

(5) Compulsory retirement review procedure upon completion of prescribed length of service is permissible and such a review could be made later on.

(6) An employee is required to fulfill the standard of performance applicable at the time when his case is actually reviewed and not the lesser standard applicable at the time when his case should have been reviewed. An employee who is not answering the minimum standard of performance could be compulsorily retired.

(7) Judicial review of compulsory retirement is circumscribed.

(8) Compulsory retirement of an employee, though one has satisfactory performance for a fairly long time, but when he has tendency to resort to avoidable fight or litigation and most of them being unsuccessful, such an employee can be retired and the decision of the employer cannot branded be as unreasonable.

It is an admitted fact that the impugned order of compulsory retirement falls within the ambit of second category, like that, it is in exercise of rule provision and not punitive or stigmatic. Jamnagar Municipal servants could be, compulsorily, retired by the competent authority in view of the provisions of rule 5 of the Age of Compulsory Retirement Rules (Rules). Rule 5 reads as under:

"Rule (5), Jamnagar Municipality may require any servant to retire at any time on or after he/she attains the age of 55 years on giving him/her three months's previous written notice without assigning any reason.

(b) Any servant may retire on or after attaining the age of 55 years voluntarily after giving at least three month's previous notice to the Municipality.

Above rules 5(a) and (b) shall apply to all classes of servants except class IV servants."

Following aspects have emerged from the record which have remained uncontroverted and they are also not vulnerable.

(1) The impugned order dated 10.7.87 recorded by the Commissioner of the respondent Corporation compulsorily retiring the petitioner from service is in accordance with rule 5 of the Rules.

(2) The Standing Committee of the respondent Corporation by passing a resolution No.607 dated 19th August, 1982 has resolved to give allowance of Rs.200 to the petitioner and it was further resolved that the same should be placed before the General Board. It was not approved by the General Board and, therefore, the Municipality has not granted the special allowance. It was, therefore, not correct that the petitioner was entitled to special allowance of Rs.200/- and he was denied the same without any blemish and fault on his part.

The averments made in the petition are controverted by the respondent Corporation. The petitioner is not entitled to continue in service till the age of 58 or 60 years as of right in view of rule power under rule 5 of the Rules. There is no dispute about the fact that no reason, much less stigmatic is assigned in the impugned order of compulsory retirement. There is also no dispute that three months notice was given to the petitioner before exercising the powers under rule 5 of the Rules.

After having taken into consideration the facts and circumstances emerging from the record, which are, virtually, not in dispute and bearing in mind the general principles of law governing the scheme of compulsory retirement, which has a historical reason and practical purpose and, in particular, the provisions of rule 5 of the Rules, the petition challenging the impugned order of compulsory retirement recorded by the respondent Corporation against the petitioner and the claim for pensionary benefits is quite meritless and deserves to be rejected with costs. Accordingly, it is rejected with costs. Rule discharged.

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